Lance Investigation Service, Inc. *and* Robert Smith.
Case 2–CA–33579

April 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On February 12, 2002, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, a cross-exception, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We reverse the judge's finding that the Respondent discharged employee Robert Smith in violation of Section 8(a)(1). We agree with the Respondent that Smith was not discharged, but rather abandoned his employment. Accordingly, we shall dismiss the complaint in its entirety.

I. RELEVANT FACTS

Smith was employed by the Respondent as a security guard at the Diego Beekman House in the Bronx, New York. It is undisputed that he was entitled to vacation pay under the collective-bargaining agreement governing his employment.

In November 2000, Smith first notified the Respondent that he sought vacation pay for the week of December 17, 2000. Before and during that vacation week, Smith inquired about his vacation pay. When he did not receive it on the first payday in January 2001,[2] he made several requests for it to his supervisor. In addition, on several occasions in early to mid-January, Smith called the office of Keith Johnson, the Respondent's vice president of finance and operations in charge of payroll. Johnson did not return those calls.

On January 24, Smith left a message for Johnson with a secretary, asking, "What do I have to do to get my vacation pay, get a lawyer?" Johnson then returned Smith's call. Johnson informed Smith that his vacation check was at the office and he could pick it up. Johnson also stated to Smith, "[Y]ou're that wise guy who threatened me with a lawyer," and "we'll see how long you're working for me at that site, wise guy."[3]

When Smith went to the office after work that day, Johnson handed Smith his vacation check. Johnson said that he wanted to speak to Smith. Johnson was attending to other business at the time and asked Smith to sit down and wait. After just a few minutes, Smith complained that he was on his own time and left without saying anything to the secretary in the office.

The next day, January 25, about an hour after Smith began work, Smith's supervisor, Roy Headen, told him to come to the office. When Smith got there, Headen told Smith to punch out and go home; he was "off the schedule." When Smith asked why, Headen responded that Johnson had taken Smith off the schedule. Smith then asked Headen what Headen would do if he were Smith. Headen responded, "If I was you, I'd go see Keith Johnson." Smith never did so, and he never returned to work. Instead, Smith telephoned his union representative and, the next day, sent a "notification of an official grievance" to both his union representative and to the Board's Regional Office. The "grievance" complained about Smith's removal from employment.

II. DISCUSSION

The judge found that Smith did not abandon his employment, but was terminated by the Respondent for engaging in the protected concerted activity of invoking his right to vacation pay under the collective-bargaining agreement. The judge found that the Respondent's action in removing Smith from the schedule, in the context of the conversation Smith had with Johnson the previous day, would reasonably have led Smith to believe that he had been terminated. In addition, the judge reasoned that any ambiguity in Smith's status should be resolved against the Respondent.

In its exceptions, the Respondent contends, inter alia, that its conduct would not have reasonably led Smith to believe that he had been discharged, and that the Respondent should not be held responsible for Smith's failure to meet with Johnson to clarify Smith's employment status. We agree with the Respondent and reverse the judge.

"The test for determining whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged." *Ridgeway Truck-*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates hereafter are in 2001.

[3] The General Counsel did not allege that Johnson's statement violated the Act.

ing Co., 243 NLRB 1048 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980) (quotations and citation omitted). The Board has held that the "fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or action of the employer 'would logically lead a prudent person to believe his [her] tenure has been terminated.' *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964)." *North American Dismantling Corp.*, 331 NLRB 1557 (2000), enfd. in part 35 Fed.Appx. 132 (6th Cir. 2002).

Applying this test here, we disagree with the judge and find that the Respondent's conduct would not logically lead a reasonable person to conclude that he had been discharged. Even when viewed from the employee's perspective, the most that can be inferred from the words and conduct of Johnson and Headen was that Smith was being taken off his current site (at Diego Beekman House) and that Johnson wanted to discuss this matter with him.

More specifically, Johnson's January 24 statement (that Smith would see how long he was working for Johnson "at that site") was, at most, a threat to remove Smith from his post at Diego Beekman House. Clearly, it did not express an intention to terminate his employment. In addition, when Johnson told Smith on January 24 that Johnson wanted to talk to Smith, there is no indication that Johnson wanted to apprise Smith that discipline was being imposed. Johnson simply said that he wanted to talk to Smith. Further, even assuming arguendo that Johnson had decided upon discipline and intended to inform Smith thereof, there is nothing to indicate that the discipline was discharge. At most, it was the effectuation of the threat to remove Smith from the site. Similarly, Headen's remark was, at most, a carrying out of Johnson's decision. This action, and the remark apprising Smith of the action, did not mention discharge, termination, or any other permanent severance from employment.[4]

The Respondent's subsequent conduct on January 25 is completely consistent with the above. The Respondent's custom is that employees who receive discipline less severe than discharge are removed from the schedule and are expected to meet with Johnson to discuss their discipline before being returned to the schedule. Thus, Johnson's removal of Smith from the schedule, Headen's informing Smith that he was off the schedule, and Headen's invitation to Smith to go see Johnson were all consistent with discipline short of discharge. Likewise, Headen's statement to Smith to go home was perfectly consistent with discipline short of discharge. See, e.g., *Interlink Cable Systems*, 285 NLRB 304, 305, 307 (1987) (finding that in particular circumstances, employer statement to employees that they would have to punch out and go home would not have reasonably led employees to believe that they had been terminated).

Further, even if there was an ambiguity as to whether Smith was discharged, Smith could have easily cleared the matter up. The Respondent twice offered Smith the opportunity to clarify his status, but he failed to do so. Rather than meet with Johnson as requested on January 24, Smith left after waiting only a few minutes. Similarly, Smith never complied with Headen's January 25 invitation to meet with Johnson. Instead, Smith left, never to return. Smith clearly could have availed himself of either opportunity to clarify his status. He failed to do so.

This finding is supported by *Pink Supply Corp.*, 249 NLRB 674 (1980). In that case, the employer told employees who were engaged in a concerted refusal to work that it would have to act as if they were quitting, but the employees' spokesman denied that they were quitting. The employer invited the spokesman to clarify the employees' status by asking, "Well, what do you call it? What am I supposed to do?" The spokesman did not respond to these questions, but stated that the employees would come in to clean out their desks. The Board found that the employer did not discharge the employees in violation of Section 8(a)(1). The Board said:

> This is not a case where an ambiguity was created by Respondent's wrongdoing and where, consequently, the burden of the results of that ambiguity must fall on it. While the whole situation may have put the employees in some doubt as to their status, we see no basis in the credited evidence for charging Respondent with any heavier responsibility for the uncertainty than is attributable to the employees themselves. . . . The situation certainly did not make further inquiries into Respondent's intentions futile . . . . At worst it created an uncertainty that each party was equally well equipped to rectify. In these circumstances we agree with the Administrative Law Judge that the General Counsel has not met his burden of proof. Id.

Similarly, as noted above, the Respondent twice invited Smith to meet with Johnson to clarify Smith's employment status, but Smith did not do so. The ambiguity in Smith's employment status existed because he failed to act on the Respondent's invitations. Thus, as in *Pink Supply Corp.*, "we see no basis in the credited evidence for charging Respondent with any heavier responsibility

[4] We agree that the word "discharge" is not necessary to denote a permanent termination of employment.

for the uncertainty than is attributable to the [employee] [himself]." Id.

Our dissenting colleague contends that we should resolve any ambiguity against the Respondent, relying on *Flat Dog Productions, Inc.*, 331 NLRB 1571 (2000), enfd. 34 Fed.Appx. 548 (9th Cir. 2002). In that case, however, the ambiguity in the employees' status was caused by the fact that the employer made two inconsistent statements, and did not offer employees a chance to clear up the matter. That is, the employer explicitly told the employees that they had been fired and referred to them as "former employees." At the same time, the employer was telling the employees the contrary, i.e., that they could return to work. The employer gave no opportunity to clarify the inconsistency.

The dissent's argument (that Smith was discharged) is based in part on the fact that the Respondent ordinarily accompanies discipline less severe than discharge with a written notification to the employee. However, the obverse (that the absence of such a notification to Smith means that he was discharged) is not a logical sequitur. Indeed, it is counterintuitive to believe that there is a lesser communication for the greater sanction. In any event, there is no evidence addressing the procedures used when an employee is discharged, so we do not know what, if any, communication the Respondent used in discharge situations. Thus, the dissent's contention is without merit.

Hale Mfg. Co., 228 NLRB 10 (1977), enfd. 570 F.2d 705 (8th Cir. 1978); and *TPA, Inc.*, 337 NLRB 282 fn. 6 (2001), are clearly distinguishable. In those cases, *the employer* had the opportunity to clarify its own ambiguity, and failed to do so. By contrast, in the instant case, *the employee* had the opportunity to clarify an alleged ambiguity and he failed to do so.

Accordingly, we find that the General Counsel has not met his burden of proving that the Respondent terminated Smith's employment in violation of Section 8(a)(1) of the Act.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

Contrary to my colleagues, I agree with the judge that the Respondent violated Section 8(a)(1) of the Act by terminating employee Robert Smith because he sought vacation pay under the collective-bargaining agreement. At the very least, the Respondent's conduct created a climate of ambiguity and confusion concerning Smith's status. Under established Board precedent, the Respondent had the burden to remove that ambiguity and clarify Smith's status, and it plainly failed to do so.

The facts are more fully set forth by the majority, but briefly are as follows. On several occasions in early to mid-January, Smith called the office of Keith Johnson, the Respondent's vice president of finance and operations in charge of payroll, to obtain vacation pay to which Smith was entitled under the collective-bargaining agreement governing employees' terms and conditions of employment. Johnson did not return those calls, so on January 24, Smith left a message for Johnson with a secretary, asking, "What do I have to do to get my vacation pay, get a lawyer?" Johnson then returned Smith's call and stated to Smith, "[Y]ou're that wise guy who threatened me with a lawyer," and "we'll see how long you're working for me at that site, wise guy."

After work that day, Smith went to pick up his vacation check. When Johnson saw Smith, Johnson said that he wanted to speak to Smith. Smith agreed, but Johnson told Smith to sit down and wait in Johnson's office. Johnson then left to take care of other work. Smith complained that he was on his own time, waited several minutes, but left when Johnson still did not return.

The next day, January 25, about an hour after Smith began work, Smith's supervisor, Roy Headen, told him to come to the office. When Smith got there, Headen told Smith to punch out and go home; he was "off the schedule." When Smith asked why, Headen responded that Johnson took Smith off the schedule.[1] Smith then asked Headen what Headen would do. Headen responded, "If I was you, I'd go see Keith Johnson."

As correctly noted by my colleagues, in determining whether an employee has been discharged, the Board has held that the "fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or action of the employer 'would logically lead a prudent person to believe his [her] tenure has been terminated.' *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964)." *North American Dismantling Corp.*, 331 NLRB 1557 (2000), enfd. in part 35 Fed.Appx. 132 (6th Cir. 2002). In *Flat Dog Productions, Inc.*, 331 NLRB 1571 (2000), enfd. 34 Fed.Appx. 548 (9th Cir. 2002), the Board, quoting *Brunswick Hospital Center, Inc.*, 265 NLRB 803, 810 (1982) (citations omitted), stated:

> In determining whether or not [an employee] has been discharged, the events must be viewed through the [employee's] eyes and not as the employer would have viewed them. The test to be used is whether the acts reasonably led the [employees] to believe that they were discharged. If those acts cre-

[1] Headen testified that Johnson never told Headen why Smith was removed from the schedule.

> ated a climate of ambiguity and confusion which reasonably caused [employees] to believe they were discharged or, at the very least, that their employment status was questionable because of their [protected] activity, the burden of the results of that ambiguity must fall on the employer.

Applying this test here, I agree with the judge that the Respondent's conduct would have reasonably led Smith to conclude that he had been discharged. One day after Smith was threatened by Johnson with loss of employment,[2] Smith was involuntarily removed from the schedule without pay. Smith was told that was it at the behest of Johnson, and Smith was told to go home. Contrary to my colleagues, I would find that this conduct of the Respondent, when viewed through Smith's eyes, would have reasonably led Smith to believe that he had been terminated.

In addition, Headen did not orally clarify Smith's employment status or the reason for his removal from the schedule. Nor did the Respondent provide Smith with any written disciplinary notice, despite evidence showing that employees receiving discipline less severe than discharge customarily receive a written disciplinary notice when they are removed from the schedule.[3] This suggests that the Respondent did not intend merely to correct Smith's behavior, but rather intended to discharge him. Further, because Smith had never been disciplined before, it was reasonable for him to interpret the Respondent's unexplained removal of him from the schedule as a discharge.[4]

This finding is supported by *Hale Mfg. Co.*, 228 NLRB 10, 11–13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978). In that case, a dispute arose between employees and management over terms and conditions of employment. A supervisor became angry and stated to the employees, "[Y]ou are all going to have to go home." The respondent did not clarify the employees' status when provided the opportunity. The Board found, with court approval, that the employees reasonably believed that they had been discharged based on the respondent's words and conduct. As in *Hale*, I would find that the Respondent's words and conduct—threatening Smith with loss of employment, removing him from the schedule, telling him to go home, and failing to clarify his status when provided the opportunity—would have reasonably led Smith to believe that he had been terminated for protected activity.

At the very least, there existed an ambiguity as to whether Smith was discharged. Under established Board precedent, if an employer's "acts created a climate of ambiguity and confusion which reasonably caused [employees] to believe that they were discharged or, at the least, that their employment status was questionable because of their [protected] activity, the burden of the results of that ambiguity must fall on the employer." *Flat Dog Productions*, supra, 331 NLRB at 1571 (quotations and citations omitted). Thus, it was the Respondent's burden to clarify any ambiguity caused by its actions that would have reasonably caused Smith to believe that his employment status was questionable.

The majority applies the wrong burden of proof and, consequently, reaches the wrong result. My colleagues state that "the Respondent twice offered Smith the opportunity to clarify his status, but he failed to do so." However, as discussed above, it was not Smith's burden, but the Respondent's burden, to clarify any ambiguity caused by its actions that would have reasonably caused Smith to believe that his employment status was questionable. See *Flat Dog Productions*, supra, 331 NLRB at 1571 (quoting *Brunswick Hospital Center, Inc.*, supra, 265 NLRB at 810).[5]

Under the proper burden of proof, the facts relied on by the majority are plainly insufficient to satisfy the Respondent's burden. On January 24, Johnson, who had just threatened Smith earlier that day, told Smith he wanted to talk to him. Yet, when Smith agreed, Johnson ignored Smith and made him wait in Johnson's office for several minutes while Johnson performed other work. On January 25, Smith twice sought to clarify his situation by asking why he had been removed and what to do, but Headen merely responded that Johnson had removed Smith and that Smith might try what he had unsuccessfully attempted the previous day: "If I was you, I'd go see Johnson." The Respondent's above actions did not clarify Smith's questionable employment status, but in

[2] My colleagues' contention that Johnson's statements did not amount to a threat of discharge is unpersuasive. Johnson twice referred to Smith as a "wise guy," accused him of "threaten[ing] [Johnson] with a lawyer," and ominously stated, "We'll see how long you're working for me at that site." My colleagues place undue emphasis on the words "at that site" and overlook the central thrust of Johnson's remarks, which unmistakably conveyed the message that Smith's days with the Respondent were numbered.

[3] There is no evidence that any other employee was deprived of a disciplinary "write up" when disciplined short of discharge by the Respondent.

[4] See *TPA, Inc.*, 337 NLRB 282, 283 fn. 6 (2001) (finding that employer's silence and inaction when provided the opportunity to clarify employee's status confirmed employee's reasonable belief that she was discharged).

[5] *Pink Supply Corp.*, 249 NLRB 674 (1980), relied on by the majority, is distinguishable. The *Pink Supply* Board expressly stated that "[t]his is not a case where an ambiguity was created by Respondent's wrongdoing." The same cannot be said here, where the Respondent wrongfully threatened Smith with discharge, wrongfully removed him from the schedule, and wrongfully sent him home.

fact added to the "climate of ambiguity and confusion." Id. Consequently, "the burden of the results of that ambiguity must fall on the [E]mployer." Id.

Accordingly, for all these reasons, I would affirm the judge's finding that Smith did not abandon his employment, but was discharged in violation of Section 8(a)(1) of the Act.[6]

Christian R. White, Esq. and *Terry Morgan, Esq.*, for the General Counsel.

Jeannetta Alexander, Esq. (Catafago Law Firm, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in New York, New York, on November 15, 2001. Robert Smith, an individual, filed the charge on February 8, 2001, and the complaint issued on May 21, 2001.[1] The complaint alleges that the Respondent, Lance Investigation Service, Inc., discharged Smith on January 25 because he claimed his right to vacation pay under the terms of a collective-bargaining agreement. Smith's discharge is alleged as a violation of Section 8(a)(1) and (3) of the Act under the theory of *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). On June 4, the Respondent filed an answer to the complaint denying the factual allegations of the complaint and denying further that it violated the Act as alleged. The Respondent asserted at the hearing and in its brief that Smith was not discharged but voluntarily quit after being taken off the work schedule.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business at 1438 Boston Road, Bronx, New York, is engaged in the business of providing residential security services. The Respondent, in conducting its operations, annually purchases products, goods, and materials valued in excess of $50,000 from points outside the State of New York, or directly from suppliers within the State of New York who purchased those supplies directly from points outside the State of New York. By admitting these facts, the Respondent has essentially admitted that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and I so find. See *Siemons Mailing Service*, 122 NLRB 81 (1959). The Respondent amended its answer at the hearing to admit, and I find, that Special and Superior Officer's Benevolent Association, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent provides security services to a number of clients, including the Diego Beekman House, a government subsidized housing development located in Bronx, New York. Security guards employed by the Respondent at the Beekman facility are responsible for protecting the property and the tenants of the building. Ralph B. Johnson is the president of the Respondent. His son, Keith Johnson, is the Respondent's vice president of finance and operations.[2] One of his responsibilities is to oversee the administration of the payroll department. James Harris, the Respondent's senior vice president, is responsible for labor relations. Roy Headen is the Respondent's security manager and the direct supervisor of its security guards at the Beekman House. The complaint alleges and the Respondent admits that Keith Johnson and Headen are supervisors and agents of the Respondent within the meaning of the Act.

The Union has represented a unit of the Respondent's security guards, including sergeants, employed throughout the New York metropolitan area for a number of years under a series of collective-bargaining agreements. The collective-bargaining agreement in effect between the Respondent and the Union in January 2001 included, at article X, vacation benefits for all regular full-time employees. The Respondent employed Smith as a regular full-time security guard at the Diego Beekman House from March 1, 1998, until January 25, 2001.[3] There is no dispute that Smith was covered by this collective-bargaining agreement.

Smith testified, without dispute, that he submitted a request for vacation with pay at the beginning of November 2000. His request was for the week of December 17, 2000. He did not receive his vacation pay before going on vacation. On December 18, 2000, while on vacation, Smith went to the Respondent's office on Boston Road to pick up his regular paycheck. While at the office, Smith inquired about his vacation pay but he did not receive it. According to Smith, he made several phone calls to the office about his vacation pay and again visited the office to pick up his paycheck on January 1, which was the next regular payday. Smith still did not get his vacation pay.[4] In January, Smith also spoke to his supervisor, Headen, about his vacation pay. Headen told him to call Keith Johnson at the office.

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[6] I would find it unnecessary to decide whether Smith's discharge also violated Sec. 8(a)(3) of the Act because the finding of an additional violation would not materially affect the remedy. In addition, I would find that the Respondent's reinstatement offer to Smith was invalid because it lapsed after an unreasonably short period of 5 days.

[1] All dates are in 2001 unless otherwise indicated.

[2] Ralph Johnson did not testify in this proceeding and appears to have had no involvement in the matter at issue here. Thus, any reference in this decision to the Johnson surname is intended to be a reference to Keith Johnson.

[3] Smith had worked at this location before March 1998, under a predecessor security contractor.

[4] An outside contractor prepares the Respondent's regular payroll. Paychecks are usually delivered to employees at their worksite. If not working on payday, employees may go to the office to pick up their checks. There is no dispute that checks for vacation pay are written in-house, under Keith Johnson's supervision, and are issued separately. Employees are required to pick up their vacation pay at the office.

Smith testified that he attempted several times during January to reach Johnson by phone, without success. Although he left messages for Johnson to call him, Johnson never did. At one point, after leaving yet another message for Johnson to call him, Smith said to the secretary who took the message, "what do I have to do to get my vacation pay, get a lawyer?" When he still received neither a response to his message, nor his vacation pay, Smith asked Headen, on January 24, if Headen knew the status of his vacation pay. Headen again told Smith that he would have to speak to Johnson. Headen also told Smith that Johnson was in the office at that time, so Smith called again and asked to speak to Johnson. This time, Johnson took Smith's call.

Smith began the telephone conversation by identifying himself to Johnson, telling him where he worked and asking about his vacation pay. When Smith told Johnson that he still had not received pay for the vacation he took in December, Johnson said he would look into it. According to Smith, Johnson then said, "[O]h yes, Robert Smith, you're that wise guy who threatened me with a lawyer." Smith told Johnson that he had not threatened him. Smith explained to Johnson why he had left such a message. Smith testified that Johnson then said, "[W]e'll see how long you're working for me at that site, wise guy." Smith asked if Johnson was threatening him and said, "If you're threatening me, I'll have to make it a class action." Johnson told Smith his check was at the office and he could come pick it up. Smith denied that he threatened Johnson or used profanity during this conversation.

Smith testified further that he went to the Respondent's office after punching out that day. Johnson was there and handed Smith his vacation check. Johnson told Smith he wanted to speak to him and Smith said he also wanted to speak to Johnson. Johnson was doing other things in the office and asked Smith to have a seat and wait. When Smith saw Johnson start going through a door to another part of the office, Smith went up to Johnson and said he was on his own time and had things to do. Johnson again told him to sit down and wait. According to Smith, he sat down and waited for several minutes. When Johnson still had not come out to speak to him, Smith left without saying anything to the secretary in the office.

According to Smith, the next day, January 25, about an hour after punching in and going to his post, Headen called him on the radio and told him to respond to the office. After waiting for someone to relieve him, Smith left his post and went to the office. Headen told Smith to punch out and go home; he was "off the schedule." When Smith asked why he was off the schedule, he was told that Keith Johnson took him off the schedule. Smith asked Headen what he would do and Headen told Smith, "[I]f I was you, I'd go see Keith Johnson." Smith acknowledges that he did not go to the office to see Johnson, or make any other contact with him after leaving the Beekman House on January 25. Instead, Smith called his union representative, Jose Cardona, and told him what happened. According to Smith, Cardona told him that he would be meeting with the Respondent and would look into the matter. The next day, January 26, Smith faxed to Cardona, and to the Board's Regional Office, a letter detailing his efforts to get his vacation pay and his removal from the schedule.[5] Smith characterized the letter as "notification of an official grievance against [the Respondent]." At the end of the letter, Smith described the remedy he was seeking through this "grievance." Smith admitted that he did not have any further contact with the Union or the Respondent after faxing this grievance. He did file the instant unfair labor practice charge on February 8.

Smith testified that he did not go back to the Respondent's office, or otherwise attempt to contact the Respondent directly because he wanted union representation. According to Smith, once he faxed his "grievance" to the Union and the NLRB, he assumed one or the other would resolve the matter for him. Smith admitted that he never returned his company-issued uniform after leaving the Beekman House on January 25.

Smith's testimony was corroborated to a great extent by Patricia Houston, another security guard employed by the Respondent at the Beekman House, and by the Respondent's representatives who testified. Headen confirmed that Smith had submitted his vacation request in November and that Smith asked him about his vacation pay on at least three separate occasions. According to Headen, he told Smith each time that he had to speak to someone in the payroll department. Headen also confirmed that, the last time Smith asked about his vacation pay, Headen told him to speak to Keith Johnson. Headen acknowledged taking Smith's name off the schedule on January 25 at Johnson's direction. According to Headen, Johnson did not give any reason for this action and did not specify any duration for keeping Smith off the schedule. Headen also acknowledged that he informed Smith on January 25 that he was off the schedule. Headen testified, in conflict with Smith, that Smith used profanity during this encounter. This testimony was inconsistent with an affidavit Headen signed during the Board's investigation of the charge. Headen did not include any profanity in his pretrial description of this conversation with Smith.

Houston was in the office on January 24 when Smith finally received his vacation pay. She had gone to the office on another matter and saw Keith Johnson hand Smith a check. Houston testified that she heard Smith ask Johnson if he could speak with him and she heard Johnson tell Smith to have a seat. Houston recalled that, after waiting a few minutes, Smith said to no one in particular, "this is my time, I have things to do, I'm not waiting" and left. A few minutes later, Houston saw Johnson come out of the office, looking for Smith. When the dispatcher told Johnson that Smith left, Houston heard Johnson say, "[T]ake him off the schedule." Houston testified that she did not hear Smith use any profanity while in the office that day. She also testified that, in the 5 years she has known and worked with Smith, she has never heard him use profanity.

Keith Johnson admitted receiving a message in January that Smith had called about his vacation pay and that the message indicated that Smith was going to hire an attorney to get his vacation pay. Johnson also acknowledged having one telephone conversation with Smith in late January and telling Headen to

[5] Smith explained at the hearing that he faxed a copy of this letter to the Board's office because he had already spoken to a Board agent about his vacation pay and about a deduction from his paycheck on January 1 that he believed was illegal.

take Smith off the schedule after this conversation. However, Johnson's version of the conversation differs significantly from that of Smith. According to Johnson, Smith was irate, demanding his "f—ing vacation pay" and accusing the Respondent of "f—ing around" with him. Johnson testified that Smith said he was "entitled to" his vacation pay. Johnson also recalled that Smith said that he had "class-action suits" filed against the Respondent and "you're all going to get yours, you'll see." Johnson testified that he told Smith that his check had been sitting in the office for 2 weeks. According to Johnson, Smith responded, "I'm gonna get the Union, I'm gonna sue you personally, you're going to get yours, Lance is going to see, I've got a class action against Lance." Johnson testified that he finally hung up on Smith because Smith was yelling at him over the phone. Johnson testified further that he did not recall seeing Smith in the office after this conversation, did not recall speaking to Smith in the office, and did not recall giving Smith his check.

Johnson testified that he told Headen to remove Smith from the schedule because Smith had been insubordinate with him during the telephone conversation. According to Johnson, he only wanted to speak to Smith to find out what the problem was before putting him back on the schedule. Johnson denied that his instruction to Headen to take Smith off the schedule was the equivalent of a termination. Johnson testified that, under the Respondent's procedures, when someone is taken off the schedule, they are expected to go to the office for a meeting before being put back on the schedule. Houston and Headen also testified that being taken off the schedule usually meant that the Respondent wanted to see the employee in the office. However, being taken off the schedule was normally accompanied by a written notification of some infraction subject to discipline. Johnson and Headen both acknowledged that Smith was an exemplary employee who had not received any discipline before this incident.

Johnson's testimony that he removed Smith from the schedule for insubordination is inconsistent with the affidavit he signed during the investigation. Although Johnson described the telephone conversation in the affidavit, he did not characterize Smith's conduct as insubordination. Although Johnson testified that he told Headen that insubordination was the reason for removing Smith from the schedule, he did not say this in his pretrial affidavit. In fact, Headen testified at the hearing that Johnson did not give him any reason for the removal of Smith from the schedule. At the hearing, Johnson was forced to concede that there is nothing in the Respondent's records that would document that Smith was removed from the schedule for insubordination.

The Respondent also called James Harris, its vice president with labor relations' responsibility, to testify that he received no grievance from the Union about Smith's vacation pay or removal from the schedule. Harris also denied that anyone from the Union contacted him for a meeting to discuss Smith or his grievance. Harris testified that no such meeting was ever scheduled.

To the extent there is any conflict in the testimony, I have chosen to credit Smith over Headen and Johnson. I found Smith to be a generally credible witness. Headen's and Johnson's testimony was less credible because of inconsistencies between them, and inconsistencies with their prior affidavits. Moreover, it appears to me that Johnson's claim of insubordination was no more than a post hoc rationalization for the actions he took. The alleged use of profanity by Smith appears to be out of character for him in light of his prior record of employment and the testimony of Houston.

The General Counsel alleges that the Respondent terminated Smith on January 25 because he engaged in concerted activities protected by Section 7 of the Act. The Supreme Court, in *City Disposal Systems*, supra, approved of the Board's interpretation of Section 7 of the Act as including, within the definition of "concerted activity," an individual employee's "reasonable and honest invocation of a right provided for in his collective-bargaining agreement." Such activity falls within the "mutual aid and protection" clause even if the individual employee has his own interests most immediately in mind. 465 US at 830, supra. The Court agreed with the Board that the employee did not have to make an explicit reference to the collective-bargaining agreement when invoking his rights as long as it was reasonably clear that the right asserted was one encompassed by the agreement. Id. at 839–840. The Court also agreed with the Board that an employee's invocation of a perceived contractual right was protected regardless of whether the employee turned out to have been correct in his belief as to his rights. Id. at 840. See also *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). Accord: *Union Carbide Corp.*, 331 NLRB 356 (2000).

The Respondent appears to concede that Smith's efforts to get his vacation pay in January was concerted activity within the meaning of the Act, as interpreted by the Court in *City Disposal*, supra. The above evidence establishes clearly that it was. The Respondent argues that Smith was not terminated for seeking vacation pay under the collective-bargaining agreement. Rather, according to the Respondent, Smith was removed from the schedule on January 25 because he had been insubordinate during his telephone conversation with Keith Johnson. Under the Respondent's view, Smith's conduct was not protected. Moreover, the Respondent contends that Smith's removal from the schedule did not amount to termination, but was intended solely to get Smith to come to the office for a meeting with Keith Johnson.

In order to resolve this case, it must first be determined whether Smith was terminated, or simply abandoned his employment by failing to contact the Respondent after his removal from the schedule. The test applied by the Board to such questions is whether the actions of the employer would reasonably lead an employee to believe he or she had been terminated. If the employer's actions create any ambiguity regarding the employee's status, the Board will resolve the ambiguity against the employer. *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980). Accord: *MDI Commercial Services*, 325 NLRB 53 (1997); *Apex Cleaning Service*, 304 NLRB 983 fn. 2 (1991); *Express Messenger Systems*, 301 NLRB 651 (1991).

The Respondent admits that it informed Smith on January 25 that he had been removed from the schedule. It is undisputed that Smith was not given any reason for this action. The Re-

spondent's action occurred the day after Smith was told by Keith Johnson, in response to Smith's demand for his vacation pay, that Smith wouldn't be working for the Respondent at the site much longer if he threatened Johnson with legal action. I find that Johnson's instruction to Headen to remove Smith from the schedule was not consistent with the procedures described by Johnson, Headen, and Houston with respect to disciplinary infractions. It is undisputed that Headen did not cite any disciplinary reason for this action and did not give Smith any written disciplinary notice to sign. Because Smith had never been disciplined before, he would not necessarily know that his removal from the schedule meant he had to go to the office. Headen's suggestion that Smith go to the office to see Johnson about his removal from the schedule, in response to Smith's asking what Headen would do in the situation, did not clarify Smith's status. Smith's reluctance to take this advice was understandable in light of the tenor of his recent contact with Johnson. I find that the Respondent's action in removing Smith from the schedule, in the context of the conversation Smith had with Johnson the previous day, would reasonably lead Smith to believe he was terminated.

I also find that Smith's actions after being told to go home because he was "off the schedule" are not consistent with intent to abandon his job. On the contrary, he wrote to his union the next day, requesting a "grievance" be filed on his behalf seeking reinstatement. The fact that he sent a copy of this letter to the NLRB's regional office and filed the instant charge soon thereafter is further indication Smith did not voluntarily quit, but believed he had been terminated. Having contacted his Union and the government for assistance in getting his job back, Smith's failure to communicate with the Respondent directly is not proof that he voluntarily quit. Smith credibly testified that he expected either the Union or the Board to get him his job back.

Having found that the Respondent terminated Smith by removing him from the schedule, it must be determined what motivated the Respondent to take this action. I have already credited Smith's version of his conversation with Johnson. I thus find that Smith did not use profanity or make any other statements that would cause him to lose the protection of the Act. See *Indian Hills Care Center*, 321 NLRB 144, 151 (1996); *Consumers Powers Corp.*, 282 NLRB 130, 132 (1986). It is clear that Johnson instructed Headen to remove Smith from the schedule because Smith had invoked his right to vacation pay under the contract, threatening to go to the Union, or pursue legal action, if he did not get what he was entitled to. Because Smith's actions were protected, Johnson's reaction must be found to have been unlawfully motivated. The Board has recently held that where the conduct for which an employee is discharged is intertwined with protected concerted activity, the Board's *Wright Line*[6] analysis does not apply. *Felix Industries*, 331 NLRB 144, 145 (2000); *Nor-Cal Beverage Co.*, 330 NLRB 610, 612 (2000). Accordingly, I find as alleged in the complaint, that the Respondent terminated Smith on January 25 in violation of Section 8(a)(1) of the Act.[7]

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

CONCLUSIONS OF LAW

1. By terminating Robert Smith on January 25, 2001, because he sought vacation pay under the terms of a collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Respondent did not violate Section 8(a)(3) of the Act by terminating Robert Smith.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having unlawfully discharged Robert Smith, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Johnson testified that, on May 2, a Wednesday, he sent Smith a letter offering him reinstatement to his regular schedule with the same rate of pay, starting on May 3. The letter, which is in evidence, asks Smith to call Johnson with his decision by the following Monday, May 7. The letter advises Smith that failure to contact Johnson by that date would be considered a rejection of the offer. Johnson testified that this letter was sent by certified mail to the home address identified in Smith's personnel file. The letter on its face does not show the address to which it was addressed. The Respondent was unable to produce a return receipt card showing actual receipt of the letter. Smith denied receiving this letter. According to Smith, he did not see the letter until it was shown to him by counsel for the General Counsel at the hearing. The Board has held that a letter purporting to offer reinstatement will be deemed invalid "if the letter on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date, or if the letter otherwise suggests that the offer will lapse if a decision on reinstatement is not made by that date." *Cassis Management Corp.*, 336 NLRB 961 (2001), quoting from *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988). I find that the Respondent's May 2 letter, even if it had been received by Smith, was invalid and did not satisfy the Respondent's obligation to remedy the unfair labor practice found here.

[Recommended Order omitted from publication.]

[7] The complaint also alleges a discriminatory motive under Sec. 8(a)(3) of the Act. There is no evidence of any antiunion animus that would have motivated the Respondent's actions toward Smith. I shall thus recommend dismissal of this allegation.